Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-631

ORIE W. DAVIS,

Petitioner,

vs.

BURLINGTON NORTHERN, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondent, Burlington Northern, Inc., prays that petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be denied.

STATEMENT OF FACTS

Respondent accepts petitioner's Statement of Facts with the following additions and corrections. In addition

to the fact that the accident occurred while Davis was off duty but subject to call, it occurred on premises neither owned nor under the control of the railroad (A. 9). Plaintiff was returning to the bunkhouse from a tavern and restaurant located on the north side of 16th Avenue where during the preceding two hours or so he had had a beer and a half and some coffee. Contrary to the assertion in Petitioner's brief, he was not required to stay at the bunkhouse unless it was full (R. 94-R. 111). He could stay anywhere in the Council Bluffs area. He had only to inform the railroad of where he might be so that he could be called up for service, the same as if he were home in Creston, Iowa (A. 29, R. 94). The route Davis took to go to Bill & Mabel's and return was the one he generally took although sometimes he would go other ways (A. 24). Gross and Pitkin, Davis's co-employees, each took routes different from that taken by Davis upon returning to the bunkhouse. Gross crossed over 6th Street going east and continued on along the edge of a parking lot on the north side of 16th Avenue until he reached a railroad crossing towards the bunkhouse (A. 19, R. 10-11). Pitkin had taken a path back to the bunkhouse through the area which the contractor was tearing up for use in constructing the freeway (A. 19, R. 15-16). Pitkin found Davis at a point which was not on railroad property. This is marked "x" on plaintiff's Exhibit No. 1 attached to the Eighth Circuit Opinion.

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REASONS FOR DENYING THE WRIT

Plaintiff failed in his effort to make a prima facie case under the Federal Employers Liability Act by failing to

prove that the railroad, with the exercise of due care, could have reasonably foreseen that the condition of the path used by Davis could have caused this injury. This is because of plaintiff's failure to prove that the route Davis took to return to the bunkhouse from the tavern was one customarily taken by railroad employees. The teaching of *Toledo St. L & W R Co. v. Allen,* 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513 is that an FELA case is governed not only by that Act but also the principles of the common law as applied in the courts of the United States. Its holding that a plaintiff cannot recover in the absence of negligence on the part of the railroad is echoed in *McGivern v. Northern Pacific Ry. Co.,* 132 F. 2d 213, 217 (8th Cir. 1942) where the court spoke as follows:

> "The common law rules for determining negligence on the part of an employer towards his employee are controlling on the question as to what constitutes negligence within the meaning of the Federal Employers' Liability Act, unless by the term of the Act common law rules are abrogated. We are not here concerned with any act containing such abrogation or qualification. The rule applicable to all duties arising between the employer and the employee is the requirement to exercise reasonable or ordinary care in view of all the circumstances. *Missouri Pac. R. Co. v. Aeby,* 275 U. S. 426, 48 S. Ct. 177, 72 L. Ed. 351; *Toledo, St. L. & W. R. Co. v. Allen,* 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513. Generally speaking it may be said that the defense available in this class of action is that the employer was free from negligence proximately causing the injury."

In the decision of whether one's negligence is a proximate cause of another's injury foreseeability has become an indispensable element. Proof of foreseeability of harm is a necessary part of making a prima facie case under the

Act. As stated in *Gallick v. Baltimore & Ohio R. R. Co.*, 372 U. S. 108, 117, 7 L. Ed. 2d 618, 83 S. Ct. 659, citing *Inman v. Baltimore & O. R. Co.*, 361 U. S. 138, 140, 4 L. Ed. 2d 198, 200, 80 S. Ct. 242, reasonable foreseeability of harm is an essential ingredient of Federal Employer Liability Act negligence. At 372 U. S. 118 the court spoke as follows:

> "The jury had been instructed that negligence is the failure to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances;[6] and that defendant's duty was measured by what a reasonably prudent person would anticipate as resulting from a particular condition—'defendant's duties are measured by what is reasonably foreseeable under like circumstances'—by what 'in the light of the facts then known, should or could reasonably have been anticipated.'"[7]

[6] "Negligence is sometimes said to be a failure to observe for the protection of the rights of others that degree of care, precaution, and vigilance which the circumstances justly demand, and sometimes, in other words, it is said that negligence is the failure to observe ordinary care, and ordinary care is that degree of care which people of ordinary prudence and sagacity use under the same or similar circumstances. What would ordinarily prudent persons have done under like circumstances?"

[7] "The B & O in this case was not required to guard against that which a reasonably prudent person, under the circumstances, would not anticipate as likely to happen. If a person has no reasonable ground to anticipate that a particular condition . . . would or might result in a mishap and injury, then the party is not required to do anything to correct such a condition. You must apply this rule to this case. . . . Defendant's duties are measured by what is reasonably foreseeable under like circumstances. . . . In measuring the B & O's conduct here, the point of view to be taken should be the view before the mishap occurred, to see what, in the light of the facts then known, should or could reasonably have been anticipated. And you must follow this rule in this case."

Central to the railroad's position is the fact that Davis failed to prove that the path he took that night to return to the bunkhouse was one customarily used by railroad employees similarly returning. Having failed in this particular he did not fulfill his duty in making a prima facie case by showing that the railroad could reasonably have foreseen that he might take this route so as to be required to take precautions that it was reasonably safe for travel. The evidence was undisputed that the point where Davis turned his ankle and fell into a ditch was on property not the railroad's, that it was on property being torn up by the State of Iowa for an interstate highway approach. The evidence was equally undisputed that the spot where Pitkin found Davis was on property not the railroad's. See Appendix A of the U. S. Court of Appeals Opinion. As Judge Stephenson points out, since the land over which the path lay was no longer owned or controlled by the railroad and was an area where road construction was being conducted by the State of Iowa, it is unreasonable to suppose that the railroad should have reasonably anticipated that its employees would continue to use a path which lay across land strewn with construction debris and ditches. Furthermore, there was no testimony by either Gross or Davis as to what route was customarily taken by other employees. How could the railroad know what route to protect—assuming it had a legal duty to provide such protection?

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CONCLUSION

In light of the fact that plaintiff produced no evidence whatsoever to establish that the path taken by Davis was

one ordinarily used by railroad employees, plaintiff failed to show that the railroad reasonably should have foreseen that the Davis accident might occur and thus have the duty to provide safeguards against its occurrence. It follows that plaintiff failed to make a prima facie case and the decision of the appellate court should be affirmed.

Respectfully submitted,

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